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Extending the Scope of the Antiquities Act

Brent J. Hartman¹

INTRODUCTION

With the passage of the Antiquities Act² (the Act) in 1906, Congress granted the president the power to create national monuments.³ The Antiquities Act authorizes the president to create national monuments to protect historic or scientific landmarks, structures, or objects.⁴ The Act also allows the president to reserve the land necessary to protect these objects.⁵ Containing few limitations or guidelines, the Act provides the president with broad powers to add land to the public domain.⁶ Since the Act's passage, nearly every president has utilized the power to achieve preservation or conservation objectives.⁷ The Act has been used to create 126 national monuments,⁸ including the Grand Canyon, Devils Tower, the Badlands, and Death Valley.⁹ In many cases, national

1. Regulatory Project Manager, Ohio Aerospace Institute, Cleveland, Ohio; J.D., University of Toledo College of Law (2010); B.A., Oakland University (2006). First, I would like to acknowledge Professor Kenneth Kilbert, Associate Professor of Law, University of Toledo College of Law, for his comments and suggestions during the formation of the topic and on early drafts. I also greatly appreciate the comments and suggestions of the Public Land & Resources Law Review staff during the preparation of the article for publication. Finally, I would like to thank my wife, Orysia, for listening to me think out loud throughout the process.

2. 16 U.S.C. § 431 (2006).

3. *See id.*

4. *Id.*

5. *Id.*

6. *See id.*

7. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 488–489 (2003).

8. Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 Ecol. L.Q. 71, 124 (2002) (finding 123 monuments in 2002); Joseph Brigggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 Tul. Envtl. L.J. 403, 407 (2009) (finding that President George W. Bush added three monuments).

9. Squillace, *supra* n. 7, at 490–495.

monuments become, or are integrated into, national parks.¹⁰ In fact, more than half of the National Park System consists of national monuments.¹¹ Usage of the Act is often unpopular or politically controversial, yet judicial and legislative actions have accomplished little to limit the scope of the Act.¹² Although the Act is not without limitations, the outer bounds of its powers remain unknown.¹³

In the face of these unknowns, this article suggests several strategies a president may use to expand the executive's conservation powers under the Antiquities Act. Section I introduces the history of the Antiquities Act, providing a basis of understanding past and future use of the Act. Demonstrating the resiliency of the Act, Section II discusses the various judicial and legislative challenges faced by the Antiquities Act. Finally, Section III examines the future of the Antiquities Act and proposes several methods for utilizing the Act's minimal language in order to provide greater protection to America's historic and scientific objects, landmarks, and structures. Specifically, the scope of the Act can be expanded in two ways: 1) recognizing that the Act provides two separate powers, the declaration power and the reservation power; and 2) adopting a broad definition of the term "controlled lands." This article proposes two methods for utilizing the expanded scope: a sliding scale test to determine the level of control necessary to declare a monument and a negotiate-proclaim strategy to achieve acquiescence of the landowner where the monument is located. By teaming a broad reading of the Act with strategic utilization, a president can greatly expand the

10. *The Antiquities Act: A Century of American Archaeology, Historic Preservation, and Nature Conservation* 58 (David Harmon et al. eds., U. Ariz. Press 2006) [hereinafter *The Antiquities Act*]. The difference between a national park and national monument is discussed *infra* pt. I.C.

11. Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation – The Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 Nat. Resources J. 267, 282 (2007). Some national monuments are recognized worldwide as World Heritage sites. *Id.*

12. *Infra* pt. II.

13. Eric C. Rusnak, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 Ohio St. L.J. 669, 681 (2003).

executive branch's role in the conservation and protection of America's national treasures.

I. AN INTRODUCTION TO THE ANTIQUITIES ACT

To provide a better understanding of the broad scope of the Antiquities Act, this section provides an introduction to the Act by examining its creation, a discussion comparing national parks and national monuments, and presidential usage of the Act. The history of the Antiquities Act provides the foundation necessary to explore the challenges faced by the Act and to determine its future scope.

A. *The Creation of the Antiquities Act*

The Antiquities Act and its history are important in the analysis of its potential scope. To understand the history of the Antiquities Act, it is best to start with a display of the Act in its final form, followed by the history of its creation. The plain language of the Act states:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to

accept the relinquishment of such tracts in behalf of the Government of the United States.¹⁴

Although brief, the Act provides three necessary criteria for declarations and reservations: the monument must be historic or scientific, situated on lands owned or controlled by the government, and confined to smallest area compatible for proper management.¹⁵ Notably, the Act does not include any definitions for the criteria.¹⁶ Despite its simplicity, the Act was years in the making, not simply a whim of Congress.¹⁷

The Antiquities Act resulted from a change in federal land management policy¹⁸ and the efforts of Representative John F. Lacey (Lacey) and Edgar Lee Hewett (Hewett) with the backing of the General Land Office (GLO).¹⁹ Through most of the nineteenth century, the United States followed a policy of disposition in regard to public land.²⁰ The goal of the disposition period was to develop the West.²¹ To achieve this goal, the GLO was created to oversee the disposal of public land.²² Further exemplifying the desire to settle the West through the disposal of public land, The Homestead Act²³ and Mining Act of 1872²⁴ were passed to encourage western development.²⁵ An increasing interest in Native American sites, frequently subject to vandalism and rampant profiteering, and the realization that the western frontier was finite,²⁶ marked a shift in the

14. 16 U.S.C. § 431.

15. *Id.*

16. *Id.* This article suggests creating a definition section for the Act. *Infra* pt. III.D.

17. *The Antiquities Act*, *supra* n. 10, at 220.

18. Sellars, *supra* n. 11, at 272.

19. Squillace, *supra* n. 7, at 479.

20. *The Antiquities Act*, *supra* n. 10, at 220.

21. James Rasband, James Salzman & Mark Squillace, *Natural Resources Law and Policy* 119 (West 2004).

22. *The Antiquities Act*, *supra* n. 10, at 220.

23. 43 U.S.C. §§ 161–164 (repealed 1976); 43 U.S.C. § 291 (repealed 1976).

24. 30 U.S.C. §§ 21–54 (2006).

25. Sellars, *supra* n. 11, at 272.

26. *The Antiquities Act*, *supra* n. 10, at 22–27, 267–268.

disposition policy toward retention of federal land for preservation and conservation.²⁷ The GLO had only one weapon to combat the vandalism and profiteering of Native American sites: the power of withdrawal.²⁸ But the power of withdrawal could only provide temporary protection.²⁹ Failing to achieve protection of these sites through federal land withdrawals, the GLO found an ally in Congress, Lacey, and a dedicated proponent of archaeology, Hewett, to champion the cause.³⁰

Lacey was an eight-term Republican representative from Iowa.³¹ Lacey's personal connection with conservation issues is unknown, other than Lacey's dedication to the committee process and his placement on the House Committee on Public Lands early in his congressional career.³² However, more is known about Hewett's motives in crafting the Act.³³ Hewett, deeply involved in archaeology and a resident of New Mexico, believed the government should act as a steward for archaeological resources located on federal land.³⁴ Reconciling the problem of dueling bills between the government and scientific community, Hewett drafted a non-controversial bill with careful wording to appease both sides, satisfying the government's desire for protection and the scientific community's desire for access.³⁵ Hewett relayed the bill to Lacey, whom he had worked with in the past on conservation issues.³⁶ Within no time, the Act was signed by President Theodore Roosevelt.³⁷ While Lacey's connection to conservation was not as developed as Hewett's, throughout his career, Lacey backed a variety of bills preserving public lands.³⁸ Prior to the Act itself, Lacey

27. Sellars, *supra* n. 11, at 274; Rusnak, *supra* n. 13, at 674; *The Antiquities Act*, *supra* n. 10, at 22–27.

28. *The Antiquities Act*, *supra* n. 10, at 27.

29. *Id.*

30. Sellars, *supra* n. 11, at 279–282; *The Antiquities Act*, *supra* n. 10, at 35–47.

31. *The Antiquities Act*, *supra* n. 10, at 51, 56.

32. *Id.* at 51–55.

33. *Id.* at 35–47, 270.

34. *Id.*

35. *Id.* at 270.

36. *Id.* at 36.

37. *Id.* at 31.

38. Squillace, *supra* n. 7, at 479.

introduced bills with a much larger scope than the Antiquities Act.³⁹ For example, an early Lacey bill incorporated elements similar to those ultimately passed a decade later in the National Park Service Act.⁴⁰ The expansive language of these early acts led to resistance in Congress, particularly from western states accustomed to the government facilitating development.⁴¹ Thus, the potential size of monuments and permanent federal control over these large tracts of land became a rallying point for those opposing Lacey's bills.⁴² Although early versions of the Act included language specifically limiting monument size, the Act places no acreage limits on monuments.⁴³ Instead, the Antiquities Act states that monuments must only "be confined to the smallest area compatible with the proper care and management of the objects to be protected."⁴⁴ Leading up to the passage of the Act, Lacey addressed the concerns of his western colleagues, perhaps easing their minds.⁴⁵ Lacey stated the purpose of the legislation was to protect objects, not large tracts of land.⁴⁶ After prior failed attempts, perhaps Lacey simply wanted support for his bill, taking steps necessary to ensure its enactment.⁴⁷ Regardless of Lacey's motive, the Antiquities Act ultimately succeeded and continues to play a major role in public land management.⁴⁸ Despite the widespread concern over the bills Lacey introduced, there is sparse legislative history of the Antiquities Act to examine. Of the history that exists, some of it supports a broad reading and some of it supports a narrow reading of the Act's key language. A report before the 59th House of Representatives states that the purpose of the Act is to protect relics by reservation of small tracts of land and that the Act pertains to relics found on public and

39. Sellars, *supra* n. 11, at 281–282.

40. *Id.*

41. Squillace, *supra* n. 7, at 481.

42. Sellars, *supra* n. 11, at 295.

43. Squillace, *supra* n. 7, at 483.

44. 16 U.S.C. § 431.

45. *The Antiquities Act*, *supra* n. 10, at 272; Sellars, *supra* n. 11, at 295–296.

46. Sellars, *supra* n. 11, at 295–296.

47. *Id.*

48. *Infra* pt. I.C.

private land.⁴⁹ Astoundingly, the Act is frequently used for the exact opposite purpose of the report — the preservation of large tracts of public land.⁵⁰

Similarly, an examination of the Senate's Committee on Public Lands' report and the floor debate prior to passage suggests the Senate shared the House's view of the Act.⁵¹ During the brief floor debate,⁵² opponents voiced concerns that the Act would grant the federal government permanent control over large tracts of land.⁵³ As noted above, Lacey addressed the concerns of his western colleagues by stating that the Antiquities Act aimed to protect objects on small tracts of land.⁵⁴ However, based on prior attempts to pass similar bills and the language of the final act, Lacey, Hewett, and their allies in the GLO probably intended the subsequent sweeping usage.⁵⁵

A comparison of failed early versions of the Act to the successful Act itself also provides some insight as to congressional intent. The early bills differ from the Act in two distinct ways — size limits and scope. First, despite pressing concern over the issue, the Act contains no acreage limits.⁵⁶ Second, an organization that Hewett was active in,⁵⁷ the American Anthropological Association, managed to include the word “scientific” in the Act's descriptors of potentially protected objects.⁵⁸ These two differences between the

49. Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 Am. U. L. Rev. 517, 537 n. 114 (1992) (citing H.R. Rpt. No. 2224, 59th Cong., 1st Sess. 1 (1906)).

50. President Theodore Roosevelt started the trend with his 18 monuments totaling more than 1.2 million acres. *The Antiquities Act*, *supra* n. 10, at 74. President Clinton created 22 monuments, covering six million acres. *Id.* at 125 n. 1. President George W. Bush created the largest national monument. Briggett, *supra* n. 8, at 406.

51. Rusnak, *supra* n. 13, at 675–676.

52. Squillace, *supra* n. 7, at 484 (noting the brief floor debate over the Act).

53. *Id.* at 484 n. 59.

54. Sellars, *supra* n. 11, at 295–296.

55. Squillace, *supra* n. 7, at 477; *The Antiquities Act*, *supra* n. 10, at 272. By handing the power over to President Theodore Roosevelt, Congress should have realized the form the Act would take. *The Antiquities Act*, *supra* n. 10, at 272.

56. *Id.* at 483.

57. *The Antiquities Act*, *supra* n. 10, at 39.

58. Rusnak, *supra* n. 13, at 674–675.

failed early bills and the eventual Antiquities Act contributed greatly to the increased scope of the Act, and the acceptance of a more ambiguous act suggests Congress intended a broad scope.

While one could resolve many of the Act's ambiguities using the legislative history and Lacey's statements about the Act, the Act has largely been used to achieve the opposite of what the legislative history suggests: the Act is not limited to small tracts of land, singular objects, or temporary federal control.⁵⁹ The Act's opponents' concerns have proven true; the plain language of the Act provides the president with expansive power.⁶⁰

B. *What is a Monument?*

Predating the Antiquities Act's introduction of the term "national monument" by more than three decades, Congress introduced the term "national park" with the designation of Yellowstone National Park in 1872.⁶¹ An examination of these terms helps clarify the relationship between the executive and legislative branches in federal land management. While there may be some shared characteristics between the terms, "national parks" and "national monuments" are not synonymous terms. First, monuments and parks are created by different branches of government; Congress creates national parks, and presidents create national monuments.⁶² However, Congress has the authority to alter or repeal national monuments.⁶³ While sharing a general purpose of conservation and preservation of federal land,⁶⁴ the statutory purposes for creating

59. President Theodore Roosevelt's first proclamation, Devils Tower, was neither small, a single object, nor temporary.

60. *The Antiquities Act*, *supra* n. 10, at 72.

61. Squillace, *supra* n. 7, at 483, 487.

62. 16 U.S.C. §§ 1–18f (2006) (The Park Service Organic Act); 16 U.S.C. § 431 (2006) (The Antiquities Act).

63. *The Antiquities Act*, *supra* n. 10, at 121–122. Generally, Congress improves upon national monument designations. *Id.* at 122.

64. Squillace, *supra* n. 7, at 488–489.

parks and monuments also differ.⁶⁵ The proclamation and reservation of monuments protects historic, prehistoric, or scientific sites or objects.⁶⁶ Parks, on the other hand, preserve character and scenery.⁶⁷ Importantly, while the National Park Service manages parks, various agencies may manage monuments. This leads to one final distinction between parks and monuments: permitted uses.⁶⁸ Monuments within the national park system are subject to the same use limitations as national parks.⁶⁹ For monuments outside the park system, the permitted uses vary depending on the supervising agency.⁷⁰ Permitted uses also may vary based on proclamation objectives,⁷¹ but all national monuments prohibit mining leases.⁷² Thus, although parks and monuments may share some similar characteristics, the two classifications are distinct.

C. Presidential Usage of the Antiquities Act

Usage of the Antiquities Act spans the political and historical spectrum, solidifying its presence as a popular executive power. Within months of the passage of the Antiquities Act, President Theodore Roosevelt created the first national monument, Devils Tower National Monument.⁷³ President Roosevelt went on to create additional monuments totaling 1.2 million acres.⁷⁴ Nearly every subsequent president followed his lead, though few would top

65. Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906*, 29 Wm. & Mary Envtl. L. & Policy Rev. 159, 167–168 (2004).

66. 16 U.S.C. § 431.

67. Iraola, *supra* n. 65, at 167. Because these purposes overlap in many cases, national monuments often become integrated into national parks. Squillace, *supra* n. 7, at 488–489.

68. Squillace, *supra* n. 7, at 516.

69. *Id.*

70. *Id.* (stating that the Bureau of Land Management and Forest Service allow for the broadest use of national monuments).

71. *Id.* at 516–519 (describing national monuments as “snowflakes”).

72. *Id.* at 516.

73. Rusnak, *supra* n. 13, at 677.

74. *The Antiquities Act*, *supra* n. 10, at 74.

Roosevelt's acreage.⁷⁵ Only Presidents Nixon, Reagan and H. W. Bush failed to create at least one monument under the Antiquities Act.⁷⁶ Following the void of activity by his two immediate predecessors, President Clinton resumed the tradition of creating national monuments,⁷⁷ 22 million acres in all,⁷⁸ including the first oceanic national monument.⁷⁹ President George W. Bush, although not generally known for his strong environmental record,⁸⁰ created the largest national monument, the Papahānaumokuākea National Monument, at 140,000 square miles.⁸¹ Despite the strong tradition of the Act as a preservation and conservation tool, the broad power associated with the Antiquities Act has been the subject of considerable controversy and has consistently faced challenges.

II. CHALLENGES TO THE ANTIQUITIES ACT

Throughout its history, the Antiquities Act has faced numerous challengers offering a variety of critiques.⁸² Many of the critiques resulted in judicial and legislative challenges, and for the most part the Act has withstood these challenges. This section describes the challenges by highlighting the judicial and legislative actions opposing the Antiquities Act.

A. *Judicial Action*

As with other controversial legislation, opponents of the Antiquities Act use the courtroom as a battleground. Although it has faced a variety of legal challenges, the Act has withstood them all. Reviewing these unsuccessful challenges demonstrates the vast scope

75. Squillace, *supra* n. 7, at 490–514 (highlighting the various eras of the Antiquities Act).

76. *Id.* at 489.

77. Briggett, *supra* n. 8, at 406.

78. *The Antiquities Act*, *supra* n. 10, at 125 n. 1.

79. *Id.*

80. See Patrick Parenteau, *Anything Industry Wants: Environmental Policy under Bush II*, 14 Duke Envtl. L. & Policy Forum 363 (2004).

81. Briggett, *supra* n. 8, at 406.

82. Squillace, *supra* n. 7, at 475.

of the Antiquities Act. But to further understand the Act's success in court, the section below begins with a discussion of the reviewability of presidential statutory authority and then explores the results of the challenges to the Act.

1. *The Reviewability of Presidential Statutory Authority*

Before a court can hear the merits of a claim, opponents must clear the initial hurdle of reviewability. Generally, statutory authority delegating discretion to the president is not subject to judicial review.⁸³ However, the Antiquities Act does not provide the president with absolute discretion in creating national monuments.⁸⁴ In examining claims brought by opponents to proclamations made under the Antiquities Act, courts remain "severely limited" in reviewing the proclamation.⁸⁵ At a minimum, the president has discretion in the facts and findings included within the proclamation.⁸⁶ This discretion practically defeats all challenges to the Antiquities Act.⁸⁷ Courts must accept the president's proclamation that the objects are scientific or historic and that the federally retained area is the smallest compatible to protect the objects.⁸⁸ By simply including the "scientific or historic" and "smallest compatible" language in the proclamation, the president leaves the court virtually powerless to review his findings.⁸⁹ Although commentators argue against such a strict reviewability bar

83. *Dalton v. Specter*, 511 U.S. 462, 477 (1994). Although the president is not an agency for the purposes of the APA, *id.* at 476, judicial review of agency action is also limited if "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2006).

84. *See* 16 U.S.C. § 431.

85. *Tulare Co. v. Bush*, 185 F. Supp. 2d 18, 24 (D.D.C. 2001).

86. *Id.* at 25 (citing *Cappaert v. U.S.*, 426 U.S. 128 (1976) and *Cameron v. U.S.*, 252 U.S. 450 (1920)).

87. *See id.* at 24.

88. *Id.* at 25.

89. *See id.*

of presidential decisions,⁹⁰ the presidential power under the Antiquities Act remains largely insulated from judicial tampering.⁹¹

In addition to the facts and findings reviewability bar, potential lawsuits challenging the Antiquities Act may face additional hurdles. The Antiquities Act does not provide definitions to the few limitations it does provide,⁹² leaving many statutory terms open to vast interpretation within the proclamations. Thus, the president's broad construction of the terms such as "historic or scientific," and "smallest area compatible with the proper care and management"⁹³ have been upheld.⁹⁴ If a challenge properly raises the question of whether or not the president interpreted the term correctly, courts will likely defer to the president's interpretation, assuming the interpretation is reasonable.

In the landmark case *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court ruled that an executive agency's statutory interpretation is granted deference if the statute is "silent or ambiguous" and the agency's interpretation is reasonable and permissible.⁹⁵ The application of *Chevron* to presidential interpretations of ambiguous statutory terms remains an unsettled question.⁹⁶ Many commentators argue that the president should receive *Chevron* deference in statutory interpretation,⁹⁷ although some would limit the application of *Chevron* to when Congress directly grants the power to the president.⁹⁸

90. Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 Vand. L. Rev. 1171, 1213 (2009).

91. Courts can review discretion in accordance with the standard, but not determinations and findings of fact. *Tulare*, 185 F. Supp. 2d at 25.

92. *Infra* pt. III.D (discussing an amendment to include a definition section for the Act).

93. 16 U.S.C. § 431.

94. *Tulare*, 185 F. Supp. 2d at 22.

95. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 842–843 (1984).

96. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum. L. Rev. 263, 308–310 (2006) [hereinafter Stack, *Administer*].

97. E.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2603–2604 (2006).

98. See Stack, *Administer*, *supra* n. 96, at 309.

The application of *Chevron* to presidential statutory authority would certainly bolster presidential power under the Antiquities Act. By defining the ambiguous terms in the Antiquities Act, the president could increase the scope of an act that already provides sweeping power to conserve or preserve land and objects.⁹⁹ The ability to challenge proclamations is already “severely limited,”¹⁰⁰ but if courts apply *Chevron* deference to presidential interpretation of ambiguous statutes, the court door would be all but shut to challengers.¹⁰¹ The issue of reviewability and deference coupled with the failed challenges, detailed below,¹⁰² renders any resort to the judiciary an ineffective strategy to challenge the Antiquities Act.¹⁰³

2. Property Clause and Non-Delegation Doctrine

One common argument against the Antiquities Act is that it violates the Property Clause of the Constitution,¹⁰⁴ which states that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹⁰⁵ The Property Clause grants Congress this authority “without limitations.”¹⁰⁶ The authority extends beyond public land, to the extent necessary to protect the designated purpose of public land.¹⁰⁷ For example, as discussed earlier, Congress can use the power to create national parks.¹⁰⁸

Opponents of the Antiquities Act contend that the Property Clause grants all power over federal land to Congress.¹⁰⁹ Courts,

99. See *Infra* pt. III.B.2.

100. *Tulare*, 185 F. Supp. 2d at 24.

101. *Chevron* requires a court to determine: 1) Whether a statute is ambiguous (if it is not ambiguous, then the court's analysis ends there); and 2) If it is ambiguous, whether the agency's interpretation of the statute is reasonable. *Chevron*, 467 U.S. at 842–843.

102. *Infra* pt. II.A.2.

103. Rusnak, *supra* n. 13, at 692.

104. *Mt. Sts. Leg. Found. v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002); *Utah Assn. of Cos. v. Bush*, 316 F. Supp. 2d 1172, 1176–1177 (D. Utah 2004).

105. U.S. Const. art. IV, § 3, cl. 2.

106. *U.S. v. City and Co. of San Francisco*, 310 U.S. 16, 29 (1940).

107. *Minn. v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981).

108. *Supra* pt. I.B.

109. *Mt. Sts.*, 306 F.3d at 1134.

however, will uphold congressional delegation of such authority if it is properly delegated under the Property Clause.¹¹⁰ Opponents, therefore, argue delegation of Property Clause power through the Antiquities Act violates the Non-Delegation Doctrine.¹¹¹ The Non-Delegation Doctrine bars Congress from unconstitutionally delegating its legislative authority to another branch of government.¹¹² To avoid violating the Non-Delegation Doctrine, Congress must provide the recipient of the authority with an intelligible principle the recipient must conform to when exercising the delegated legislative power.¹¹³ Because Congress provided an intelligible principle in the Antiquities Act, the Act does not violate the Non-Delegation Doctrine.¹¹⁴ Thus, future challenges brought under the Property Clause and Non-Delegation Doctrine will continue to be unsuccessful.¹¹⁵

3. *Public Process*

The Antiquities Act has also been criticized for lack of public process, including the Antiquities Act's ability to sidestep the

110. *Utah Assn.*, 316 F. Supp. 2d at 1190–1191.

111. *Mt. Sts.*, 306 F.3d at 1133.

112. *See Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 472 (2001). The Constitution grants all legislative authority to Congress. U.S. Const. art. 1, § 1. Therefore, a congressional delegation of the power is only proper if Congress includes an intelligible principle with which the authority must comply. *Whitman*, 531 U.S. at 472. “[A]lmost never [feeling] qualified to second-guess Congress,” the Supreme Court has struck down only two statutes for violating the standard. *Id.* at 474.

113. *Whitman*, 531 U.S. at 472.

114. *Mt. Sts.*, 306 F.3d at 1137. The court stated the assertion without completely explaining what the principles are. In *Tulare Co. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002), the court affirmed the intelligible principle in the Act after rejecting challenges related to the requirement that the object be of “historic or scientific interest” and the land reservation be “confined to the smallest area compatible with proper care and management.”

115. While the Supreme Court has not spoken directly on the issue, only two statutes have been struck for violating the standard. *Whitman*, 531 U.S. at 474. Furthermore, the Supreme Court declined to review either *Mountain States*, *Mt. Sts. Leg. Found. v. Bush*, 540 U.S. 812 (2003), or *Tulare County*, *Tulare Co. v. Bush*, 540 U.S. 813 (2003).

National Environmental Policy Act (NEPA).¹¹⁶ NEPA requires federal agencies to consider environmental policy when proposing actions that may affect the human environment.¹¹⁷ The Antiquities Act requires no public input such as notice and comment, public hearings, or Environmental Impact Statements under NEPA.¹¹⁸ Presidential proclamations under the Act evade these requirements largely due to the fact that the President is not an agency,¹¹⁹ both for the purposes of NEPA¹²⁰ and the Administrative Procedure Act.¹²¹ Lack of judicial review further insulates the presidential action from the scorn of those disapproving of the proclamation.¹²² Nevertheless, there are opposing views on whether the lack of public process is a positive or negative characteristic of the Antiquities Act.¹²³

One criticism of the lack of public process is that the Antiquities Act works against democratic principles.¹²⁴ Presidents, however, are not isolated from the political process and remain accountable for political decisions through the election process.¹²⁵ Furthermore, it would be an enormous burden on Congress to manage all public land.¹²⁶ Not surprisingly, Congress has delegated management authority of federal land to agencies through legislation such as the Federal Land Policy Management Act and the National Forest Management Act.¹²⁷ The Antiquities Act furthers this efficiency by classifying land and providing guidelines for its management.¹²⁸

116. Rusnak, *supra* n. 13, at 692; Briggett, *supra* n. 8, at 404.

117. 42 U.S.C. § 4332 (2006).

118. *See* 16 U.S.C. § 431; Rusnak, *supra* n. 13, at 692.

119. *Alaska v. Carter*, 462 F. Supp. 1155, 1159 (D. Alaska 1978).

120. *Id.*

121. *Franklin v. Mass.*, 505 U.S. 788, 800 (1992).

122. Sandra B. Zellmer, *The Devil, The Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 *Ariz. St. L.J.* 941, 1044 (2000).

123. *Id.* at 1044–1047.

124. Squillace, *supra* n. 7, at 476.

125. Zellmer, *supra* n. 122, at 1047; *But see* Briggett, *supra* n. 8, at 403–404 (exploring a controversial designation by President George W. Bush in the final month of his presidency).

126. Squillace, *supra* n. 7, at 476.

127. *Id.*; *Infra* pt. II.B.1.

128. Squillace, *supra* n. 7, at 476; 16 U.S.C. § 431.

Delegated authority, however, does not preclude Congress from intervening into the issue; the broad Property Clause authority allows Congress to reverse or expand national monument designations.¹²⁹ The Antiquities Act also allows the president to avoid procedural delays, which could be exacerbated by political or business forces.¹³⁰ Because the delays may place fragile resources at risk, the precautionary principle is embodied in the Act, allowing preservation of the monument until Congress decides otherwise.¹³¹ Delay due to significant public process may cause harm to these important sites and objects.¹³²

On the other hand, additional public process could improve monument designation under the Act. Frequent criticism of the lack of public participation stems from local disapproval of land classification.¹³³ Monument proclamations are frequently unpopular with the local community.¹³⁴ Local input prior to the decision-making process could ease resistance and provide valuable knowledge about the local community's issues and needs.¹³⁵ Local input could also allow the president to fully understand the consequences of potential action,¹³⁶ appeasing, instead of enraging, the local community.¹³⁷ President Clinton made an effort to seek public input before his monument proclamations.¹³⁸ Absent an

129. Zellmer, *supra* n. 122, at 1047. Congress frequently improves upon monument designations, instead of overturning them. *The Antiquities Act*, *supra* n. 10, at 122.

130. Squillace, *supra* n. 7, at 577–578.

131. *Id.* at 580.

132. Zellmer, *supra* n. 122, at 1046.

133. *The Antiquities Act*, *supra* n. 10, at 137–38.

134. Squillace, *supra* n. 7, at 473.

135. Zellmer, *supra* n. 122, at 1046.

136. Squillace, *supra* n. 7, at 571. The passage of time generally extinguishes the opposition. *The Antiquities Act*, *supra* n. 10, at 108.

137. Bruce Babbitt, President Clinton's Interior Secretary, engaged in local input prior to suggesting monuments, often leading to legislative action to protect the lands, where local support for protection was strong. *The Antiquities Act*, *supra* n. 10, at 112.

138. Zellmer, *supra* n. 122, at 1044; Squillace, *supra* n. 7, at 539–540. President Clinton's Secretary of the Interior, Bruce Babbitt, implemented a "no surprises" policy. *Id.* at 539. The process required three steps: 1) visiting areas under contemplation for monumental status; 2) meeting with interested local

emergency, future presidents should follow Clinton's lead and seek public input. Public input may eliminate controversy, thus halting future judicial action.

B. Legislative Action

Although legal challenges to Antiquities Act proclamations have not succeeded, these failures direct opponents of the Antiquities Act to seek change through the legislative process. Courts have stated that Congress holds the power to resolve conflicts over the Antiquities Act.¹³⁹ Congress has heeded the call to action but has accomplished very little.¹⁴⁰ Congress has introduced bills to specifically limit or repeal the Antiquities Act, but Congress has rarely succeeded.¹⁴¹ Congressional attempts to limit the Act have generally followed controversial designations, such as President F. D. Roosevelt's Jackson Hole monument and President Carter's Alaska monuments.¹⁴² Congress, however, has successfully passed other legislation that shares characteristics with the Antiquities Act.¹⁴³ Opponents of the Antiquities Act suggest that these subsequent statutes supplant the Act, although not explicitly.¹⁴⁴ Specifically, opponents point to the Federal Land Policy and Management Act,¹⁴⁵ the Archaeological Resource Protection Act,¹⁴⁶ and the National Marine Sanctuaries Act.¹⁴⁷ As described below,¹⁴⁸ despite the similarities in these acts, the authority provided to the president by the Antiquities Act remains distinguishable from these acts and has not been replaced.

officials and citizens; and 3) allowing local congressional representatives to obtain protection of the area before invoking the Act. *Id.* at 539–540.

139. *See Wyo. v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945).

140. *Infra* pt. II.B.4.

141. *Id.*

142. *The Antiquities Act*, *supra* n. 10, at 81, 93.

143. *Infra* pt. II.B.1–3.

144. Michael J. Davidson, *Native American Cultural Protection Issues in Government Contracts*, 28 Pub. Contract L.J. 189, 192 (1999).

145. 43 U.S.C. §§ 1701–1787 (2006).

146. 16 U.S.C. §§ 470aa–470mm (2006).

147. 16 U.S.C. §§ 1431–1445 (2006).

148. *Infra* pt. II.B.1–4.

1. *Federal Land Policy and Management Act*

Congress passed the Federal Land Policy and Management Act¹⁴⁹ (FLPMA) in 1976 to serve as the primary statute for public land management.¹⁵⁰ The enactment of FLPMA provided federal agencies with streamlined management guidance to replace the existing piecemeal approach.¹⁵¹ As recommended by the Public Land Law Review Commission, FLPMA repealed all executive withdrawal and reservation power with one exception: the Antiquities Act.¹⁵² Although Congress left the Antiquities Act power untouched, commentators debate whether FLPMA should supplant Antiquities Act authority.¹⁵³

Debate over the relationship between FLPMA and the Antiquities Act centers around two arguments: the emergency protection debate and the spotlight debate.¹⁵⁴ In the emergency protection debate, Antiquities Act proponents argue that the FLPMA process hinders the ability of the president to preserve resources at risk of being lost forever¹⁵⁵ and that FLPMA withdrawals lack permanence.¹⁵⁶ FLPMA proponents consider the emergency

149. 43 U.S.C. §§ 1701–1787.

150. Roger Flynn, *Daybreak on the Land: The Coming Age of the Federal Land Policy and Management Act of 1976*, 29 Vt. L. Rev. 815, 816 (2005).

151. *Id.* at 817.

152. Squillace, *supra* n. 7, at 568–569.

153. Compare *id.* at 581–582 with James R. Rasband, *The Future of the Antiquities Act*, 21 J. Land Resources & Envtl. L. 619, 630–632 (2001) [hereinafter Rasband, *Future*].

154. Rasband, *Future*, *supra* n. 153, at 630–631.

155. Under FLPMA, there are three categories of withdrawals: greater than 5,000 acres, less than 5,000 acres, and emergency. 43 U.S.C. § 1714. Withdrawals greater than 5,000 acres require elaborate reports and public hearings, and the withdrawal may not last for more than twenty years. *Id.* at § 1714(c), (i). Withdrawals less than 5,000 acres also require a public hearing but require fewer reports and the length of the withdrawal is within the discretion of the Secretary of the Interior. See *Id.* at § 1714(d), (i). Emergency withdrawals are effective immediately but only last up to three years. *Id.* at § 1714(e). However, emergency withdrawals do not require a public hearing. *Id.* at § 1714(i). Instead, FLPMA subjects the emergency withdrawal to some of the same reporting requirements as the greater than 5,000 acre withdrawals. *Id.* at § 1714(e).

156. Squillace, *supra* n. 7, at 581–582.

protection argument a red herring because the Antiquities Act has never been used in an emergency.¹⁵⁷ Furthermore, FLPMA proponents counter that FLPMA allows emergency withdrawal without significant procedure,¹⁵⁸ thereby providing a more democratic process through the post-withdrawal procedures.¹⁵⁹ In return for the procedural advantages offered by FLPMA, process and procedure invite political maneuvering potentially placing the public interest at risk.¹⁶⁰

In the spotlight debate, Antiquities Act proponents argue that the Act draws attention to lands or objects that Congress might otherwise ignore¹⁶¹ or fail to protect adequately.¹⁶² Antiquities Act proponents argue further that lands withdrawn under FLPMA do not enjoy the same importance as those with a “national monument” designation.¹⁶³ FLPMA proponents, however, claim the argument is no longer relevant because the Antiquities Act withdrawals taken to bypass an unsupportive Congress were accomplished prior to the enactment of FLPMA.¹⁶⁴

While both sides make strong arguments, the Antiquities Act has continued to thrive since the 1976 passage of FLPMA.¹⁶⁵ Presidents continue to use the Antiquities Act, and Congress has not yet explicitly replaced the Act.¹⁶⁶ Therefore, FLPMA remains an alternative, not a replacement, to the Act.

2. *Archaeological Resource Protection Act*

In 1979, Congress enacted the Archaeological Resource Protection Act¹⁶⁷ (ARPA), responding to the Antiquities Act’s

157. Rasband, *Future*, *supra* n. 153, at 631.

158. FLPMA procedures must still be followed but not until after the emergency withdrawal. 43 U.S.C. § 1714(e).

159. Rasband, *Future*, *supra* n. 153, at 631.

160. Squillace, *supra* n. 7, at 578.

161. *Id.* at 540.

162. Rasband, *Future*, *supra* n. 153, at 630.

163. Squillace, *supra* n. 7, at 581–582.

164. Rasband, *Future*, *supra* n. 153, at 630–631.

165. While President Reagan and President H.W. Bush did not use the Act, all other presidents since 1976 have utilized the Act. *Supra* pt. I.C.

166. *The Antiquities Act*, *supra* n. 10, at 225.

167. 16 U.S.C. §§ 470aa–470mm.

perceived shortcomings.¹⁶⁸ ARPA declares that its goals are to secure archaeological sources located on public and Indian land and to increase communication and cooperation between governmental entities, private collectors, and the archaeological community.¹⁶⁹ While ARPA supplements the Antiquities Act, ARPA lacks too many important characteristics to consider it a proper substitute.

First, ARPA protection is limited to archaeological resources and sites,¹⁷⁰ while the scope of the Antiquities Act extends beyond archaeological objects.¹⁷¹ Second, ARPA governs resources on public and Indian lands,¹⁷² but the Antiquities Act asserts control over controlled lands in addition to public lands.¹⁷³ For these reasons, ARPA supplements the Antiquities Act, but ARPA does not alter any of the president's withdrawal power under the Antiquities Act. The Antiquities Act provides greater latitude than ARPA by protecting additional scientific and historic objects¹⁷⁴ and by potentially extending beyond public lands.¹⁷⁵

3. *National Marine Sanctuaries Act*

By title alone, the National Marine Sanctuaries Act¹⁷⁶ (NMSA) reveals itself as an insufficient alternative to the Antiquities Act; NMSA does not protect inland resources. Unlike FLPMA and ARPA, Congress enacted NMSA to function as a companion to the

168. Davidson, *supra* n. 144, at 192. Davidson's article highlights additional, more specific acts regarding the protection of Native American resources. *Id.* at 195–199.

169. 16 U.S.C. § 470aa(b).

170. *Id.*

171. *Tulare*, 185 F. Supp. 2d at 24; 16 U.S.C. § 431 (protecting "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest").

172. 16 U.S.C. § 470aa(b).

173. 16 U.S.C. § 431; "controlled lands" are discussed later in this article. *Infra* pt. III.B.2.

174. 16 U.S.C. § 470aa(b) (stating ARPA applies to archaeological sites and resources); 16 U.S.C. § 431 (stating the Act applies to "objects of historic or scientific interest").

175. *Infra* pt. III.B.2.

176. 16 U.S.C. §§ 1431–1445.

ability to reserve federal land.¹⁷⁷ As the scope of the Antiquities Act extended seaward,¹⁷⁸ commentators began to debate which act provides more capable means for marine preservation, the Antiquities Act or NMSA.¹⁷⁹

The Antiquities Act provides two advantages over NMSA. First, as noted above,¹⁸⁰ Antiquities Act proclamations avoid the requirements of NEPA and other public processes.¹⁸¹ Second, the threat of proclamation, alone, under the Antiquities Act breaks the political gridlock of the collaborative process required under NMSA.¹⁸² Therefore, the Antiquities Act can either bypass the NMSA process¹⁸³ or encourage parties to enter into NMSA negotiations.¹⁸⁴

NMSA proponents argue that proclamations over the continental shelf exceed the bounds of the Antiquities Act, potentially failing to provide actual protection of the resources if challenged.¹⁸⁵ Additionally, NMSA proponents believe that the act is

177. See Brax, *supra* n. 8, at 82.

178. Squillace, *supra* n. 7, at 518–519.

179. Compare Brax, *supra* n. 8, at 123–129 with Briggett, *supra* n. 8, at 420.

180. *Supra* pt. II.A.3.

181. Brax, *supra* n. 8, at 125.

182. *Id.* at 127.

183. The NMSA authorizes the Secretary of Commerce to designate national marine sanctuaries. 16 U.S.C. §§ 1432–1433. Before designation, the Secretary of Commerce must consider a number of enumerated factors and consult with Congress, other federal agencies, local officials, and interested citizens. 16 U.S.C. § 1433(a)(2). The Secretary of Commerce then issues a notice of the proposal in the Federal Register and to the affected communities; Congress receives detailed documentation. 16 U.S.C. § 1434(a)(1)–(2). After thirty days, the Secretary of Commerce must provide a public hearing in the area to be affected by the designation. *Id.* at § 1434(a)(3). The proposal is then subject to fishing regulations by the Regional Fishery Management Council and concerns issued by the appropriate committees in the Senate and House of Representatives. *Id.* at § 1434(a)(5)–(6). At this point, the Secretary of Commerce may submit the notice of designation with the sanctuaries regulations to Congress and for publication in the Federal Register, or the Secretary of Commerce may withdraw the designation. *Id.* at § 1434(b)(1)–(2). This simplified version of the process for a national marine sanctuary designation demonstrates its complexity in comparison to a national monument designation under the Antiquities Act.

184. Brax, *supra* n. 8, at 123–124.

185. Briggett, *supra* n. 8, at 414, 422.

slowly gaining political traction, and, if given time, NMSA can be utilized to provide meaningful marine protection.¹⁸⁶ Even if NMSA emerges as an effective means for marine protection, it does not supplant the Antiquities Act.

It is without question that FLPMA, ARPA, and NMSA provide alternative methods to address many situations in which the Antiquities Act might be used.¹⁸⁷ However, as the above discussion demonstrates, these acts are not as expansive or advantageous as the Antiquities Act.

4. *Failed Congressional Action*

The statutes discussed above do not specifically contemplate repealing or limiting the Antiquities Act. However, there have been bills introduced seeking such drastic measures, some achieving limited success. Not surprisingly, the number of bills introduced by opponents of the Antiquities Act swells after proclamation of a controversial monument.¹⁸⁸ Two victories were achieved after controversial declarations by President F. D. Roosevelt and President Carter, resulting in limitations on the Act in Wyoming and Alaska.¹⁸⁹ Following President Clinton's Grand Staircase-Escalante declaration in 1996, a number of bills were introduced but ultimately failed.¹⁹⁰ These bills included provisions for acreage limits, congressional approval, notice to state governments, NEPA compliance, or a combination of these limitations.¹⁹¹ Many of these bills suffered an early death in committee.¹⁹² The House of Representative actually passed the National Monument NEPA Compliance Act, a bill

186. *Id.* at 419–420.

187. These acts, however, do not provide provisions allowing monuments on private land. *Infra* pt. III.B.1–3.

188. *See* Rusnak, *supra* n. 13, at 701–702.

189. *The Antiquities Act*, *supra* n. 10, at 81, 93.

190. *Id.*

191. Rusnak, *supra* n. 13, at 723–728.

192. *Id.*

suggesting limited reform.¹⁹³ However, the bill stalled in the Senate, ultimately failing.¹⁹⁴

Congressional reluctance to amend the Antiquities Act, even with President Clinton facing a disapproving Republican majority,¹⁹⁵ may demonstrate a degree of congressional acquiescence to the broad authority utilized by presidents over the life of the Act.¹⁹⁶ Congress' slow reaction may be because the Property Clause checks the president's power, allowing Congress to alter proclamations as necessary.¹⁹⁷ Nevertheless, the longer Congress waits to take action, the further presidents may extend the power, increasing the likelihood that future legislation will be vetoed.¹⁹⁸

Congress has awarded two states, Wyoming and Alaska, small victories against the Antiquities Act.¹⁹⁹ In reaction to President Franklin Roosevelt's controversial declaration of the Jackson Hole monument in Wyoming, Congress amended the Antiquities Act²⁰⁰ to require congressional approval of monuments in Wyoming.²⁰¹ Likewise, following President Carter's declaration of fifteen monuments totaling fifty-six million acres in Alaska,²⁰² Congress passed the Alaska National Interest Lands Conservation Act, requiring congressional approval for monuments greater than five thousand acres.²⁰³ While these acts demonstrate that Congress may

193. *Id.* The bill required the president to solicit public comment and consult with state governments prior to designations. H.R. 1487, 106th Cong. (1999). The bill also subjected national monument management plans to NEPA. *Id.* The bill was introduced by Representative James V. Hansen of Utah and co-sponsored by representatives from Colorado, Montana, California, and Alaska. *Id.*

194. Rusnak, *supra* n. 13, at 726.

195. Squillace, *supra* n. 7, at 508.

196. *But see* Rusnak, *supra* n. 13, at 702 (arguing the "overall congressional consensus is that the Act must be rectified" but requires "proper and acceptable legislation").

197. *See* Squillace, *supra* n. 7, at 553–554.

198. *See* Rusnak, *supra* n. 13, at 723 (noting that "[w]hether or not he intends to use the Antiquities Act during his term, any president would undoubtedly not look favorably upon legislation limiting his own discretionary power."); Squillace, *supra* n. 7, at 564.

199. Rusnak, *supra* n. 13, at 688–689.

200. 16 U.S.C. § 431a.

201. Rusnak, *supra* n. 13, at 688.

202. *Id.* at 686–687.

203. *Id.* at 688.

support some limitation of the Antiquities Act, Congress has been unable to muster support for comprehensive amendment or repeal of the Act. Ultimately, however, Congress holds the power to repeal the Antiquities Act.

III. THE FUTURE OF THE ANTIQUITIES ACT

The Antiquities Act has a long history as a controversial executive power. However, the success of the Antiquities Act in promoting the conservation and preservation of America's historical and scientific sites cannot be questioned.²⁰⁴ Considering the Act's controversies and advantages discussed above, the following section contemplates future uses of the Antiquities Act.

A. Permanence of the Act

Although the Antiquities Act has a tendency to generate controversy, history indicates that the Act is not in serious jeopardy of repeal or significant amendment.²⁰⁵ The Antiquities Act has been utilized for over a century by presidents of varied political beliefs.²⁰⁶ If future presidents view the statutory authority favorably, continued preservation of the Act should not be in peril. Considering the president's veto power, it is likely that any limitation or repeal of presidential authority will require a supermajority vote of Congress.²⁰⁷ While such vast opposition is imaginable, the Antiquities Act has already survived multiple waves of legislative action, remaining virtually unscathed.²⁰⁸ While a highly controversial presidential action would have the greatest chance of triggering amendment or repeal of the Act, the Act's over-arching

204. *The Antiquities Act*, *supra* n. 10, at 7 ("In shaping public policy to protect a broad array of cultural and natural resources, the impact of the Antiquities Act is unsurpassed.").

205. *Supra* pt. II.B.4

206. *Supra* pt. I.C.

207. *See* U.S. Const. art. I, § 7, cl. 2.

208. *Supra* pt. II.

purpose of preservation and conservation makes it an unlikely target for a veto override.²⁰⁹

The judicial threat to the Antiquities Act is even less menacing. Courts already have significantly limited review of proclamations and may face even greater limitations in the future.²¹⁰ Even a major controversy provides no additional help for future Antiquities Act challenges unless the Supreme Court shifts its stance on judicial review of executive statutory authority.²¹¹

The Antiquities Act continues to thrive in the wake of legislative and judicial challenges.²¹² Accordingly, the Act's future survival rests largely in the hands of the president. Poor drafting of proclamations may lead to invalidation of certain monument designations by the courts, and foolish or controversial usage may lead to amendment or repeal by Congress.

B. *Extending the Scope of the Act*

Barring controversy, the Antiquities Act can be utilized in a more expansive way without endangering the preservation of the Act. The following section will examine two specific approaches to expanding the Act's scope: 1) separating the declaration and reservation powers and 2) defining the term "controlled lands."

1. *Two Powers – Declaration and Reservation*

The plain language of the Antiquities Act suggests that the Act grants two powers to the president: the power to declare and the power to reserve.²¹³ As explained below, separating the powers can provide greater latitude in future national monument designations.

The Act specifically states: "The President of the United States is authorized, in his discretion, to *declare* . . . national

209. Rusnak, *supra* n. 13, at 723 ("noting that [w]hether or not he intends to use the Antiquities Act during his term, any president would undoubtedly not look favorably upon legislation limiting his own discretionary power.").

210. *Supra* pt. II.A.1.

211. *Id.*

212. *Supra* pt. II.

213. See Squillace, *supra* n. 7, at 514 (noting that reservations are not required by the plain language).

monuments, *and may reserve as a part thereof parcels of land.*"²¹⁴ The declaration power authorizes the president to declare landmarks, structures, and objects as national monuments.²¹⁵ In effect, the declaration power itself attaches the national monument title to the specific landmark, structure, or object and provides an opportunity to invoke the reservation power.²¹⁶ The reservation power allows a president to reserve lands necessary for the protection and management of national monuments.²¹⁷ Without the reservation power, the object or site only obtains a title. Thus, while the declaration power establishes the monument, the reservation power, if exercised, allows presidents to provide greater protection for the monument through the classification of surrounding land as part of the monument. Although the powers are not explicitly recognized as distinct, national monument proclamations and a Supreme Court opinion provide room for the interpretation of separate powers under the Antiquities Act.

Presidents implicitly acknowledge the separation of these powers in monument proclamations. Proclamations often begin with a description of the interests in the national monument before reserving the land.²¹⁸ In some instances, the description will refer to

214. 16 U.S.C. § 431 (emphasis added).

215. *See id.* ("The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments . . .").

216. The declaration power does not necessarily invoke the reservation power, but the reservation power may only be exercised after the declaration power. *See id.*

217. *See id.* ("[A]nd may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.").

218. *See e.g.*, Exec. Procl. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009) (establishing Marianas Trench Marine National Monument); Exec. Procl. 7984, 71 Fed. Reg. 10793 (Feb. 27, 2006) (establishing African Burial Ground National Monument); Exec. Procl. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996) (establishing Grand Staircase-Escalante National Monument); Exec. Procl. 3889, 83 Stat. 924, 925 (Jan. 20, 1969) (establishing Marble Canyon National Monument); Exec. Procl. 2027, 47 Stat. 2554 (Feb. 11, 1933) (establishing Death Valley National Monument).

the object or land as a monument before the direct reservation.²¹⁹ These proclamations prominently demonstrate the reservation power's dependence on the declaration power. Of course, presidents could cut these proclamations short, creating a national monument without reserving any land.

On the other hand, there is evidence that the two powers are not separate. Recent reservation sections of proclamations recite the Act's language without the permissive "may" in the reservation clause.²²⁰ This shift in language is likely an attempt to avoid challenge to the action. First, a president will not explicitly point to the discretionary aspect of his or her power when exercising it because this signals to opponents that the action may not be necessary, thus inviting challenges. Second, likely due to the controversy surrounding the Act, presidents have begun to alter proclamations in hopes of limiting the controversy.²²¹ Further, presidential proclamations have always utilized the reservation power together with the declaration power, suggesting that the powers are inseparable.²²² Historical failure to separate the powers, however, does not negate the possibility that the powers could be used separately.

The Supreme Court has provided minimal illumination on the reservation power. In *United States v. California*, the Court briefly described the Antiquities Act power and hinted at the meaning of

219. See e.g., Exec. Procl. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996) (establishing the Grand Staircase-Escalante National Monument).

220. See *id.*; Exec. Procl. 7984, 71 Fed. Reg. 10793 (Feb. 27, 2006) (establishing African Burial Ground National Monument).

221. Compare Exec. Procl. 6920, 61 Fed. Reg. 50223 (excluding "may" in the summation of the Antiquities Act) with Exec. Procl. 3889, 83 Stat. 924, 925 (including "may" in a direct quote of the Antiquities Act). Commentators have also noted the increased precision and length of Antiquities Act proclamations. Squillace, *supra* n. 7, at 542–544.

222. See e.g., Exec. Procl. 8335, 74 Fed. Reg. 1557 (establishing Marianas Trench Marine National Monument); Exec. Procl. 7984, 71 Fed. Reg. 10793 (establishing African Burial Ground National Monument); Exec. Procl. 6920, 61 Fed. Reg. 50223 (establishing Grand Staircase-Escalante National Monument); Exec. Procl. 3889, 83 Stat. 924, 925 (establishing Marble Canyon National Monument); Exec. Procl. 2027, 47 Stat. 2554 (establishing Death Valley National Monument).

reservation in the context of the Act.²²³ Although not directly stating that the two powers are separate, the Court stated that the Act allows presidents “to create a national monument *and* reserve land for its use.”²²⁴ Just as presidents have departed from the Act’s language in recent proclamations, the Court also departed from the specific language by using “and” instead of the more permissive “and may” found in the Act itself. While the Act itself is more suggestive of a dual power, the Court in *California* did not foreclose the possibility that the Act provides two separate powers to the president.

Arguably, the Court’s brief discussion of the Antiquities Act suggests that there is not a dual power because the opinion further explained the term “reservation” without mentioning the term “declaration.”²²⁵ However, *California* involved the reservation power of the Act, not the declaration power.²²⁶ Therefore, the Act and, to a lesser extent, the Court do not impose a reservation as a requirement for the creation of a national monument.

The *California* Court also briefly discussed reservations, but the Court wavered in formulating a definition.²²⁷ The Court clearly stated that the reservation “cannot . . . escalate the underlying claim of the United States to the land in question.”²²⁸ Beyond this explicit characterization of the reservation power, the Court provided little certainty in its explanation. A perplexing “perhaps” accompanies additional clarification of the term;²²⁹ the Court suggested that reservations are simply a shift in federal land use or federal managing agency.²³⁰ Furthermore, the Court supported its uncertain explanation of “reservation” with a memorandum issued by the Bureau of Land Management (BLM) to the National Park System that contained nothing more than the BLM’s instruction for expanding one particular monument.²³¹ Because the Court’s

223. *U.S. v. Cal.*, 436 U.S. 32, 40–41 (1978).

224. *Id.* at 40.

225. *Id.* at 40–41.

226. *Id.* at 32–36.

227. *Id.* at 40–41.

228. *Id.* at 41.

229. *Cal.*, 436 U.S. at 40.

230. *Id.* at 40.

231. *Id.* at 40 n. 17.

explanation of reservations under the Act lacked sufficient support and conviction, the Act's language cannot possibly preclude reasonable, alternative interpretations of the term. Thus, by invoking the plain language, a president could arguably separate the declaration and reservation powers of the Antiquities Act.

Why would a president choose to declare a national monument without reserving land to assist with "proper care and management of the object?" In some instances, a president may believe that current land use restrictions on the land are already sufficient to properly care and manage the monument. Declaring a national monument without invoking the reservation power would allow private citizens or local government entities to manage a monument.²³² If significant protections are already in place, providing a name designation could enhance the status of an object or landmark without alerting the Act's most dangerous adversary: public controversy.

2. Defining "Controlled Lands"

In addition to separating the proclamation and reservation powers provided by the Antiquities Act, a president could extend the scope of the Act by adopting a broad reading of the term "controlled lands." Neither courts nor commentators have fully explored the issue, even though the Act states a president cannot issue a proclamation unless the landmark, structure, or object is located on "lands owned *or controlled by* the Government of the United States."²³³ The issue of controlled lands has only truly been questioned when monuments include submerged lands.²³⁴ Nonetheless, a broad definition of control would drastically increase

232. The Act clearly states that monuments may be declared on controlled lands. 16 U.S.C. § 431. If other parties also have control of the land, nothing suggests that the party must provide complete control to the government. In fact, the opposite is true. The Act provides that the party may, as necessary, relinquish control of the tract, in whole or in part, to the government. *Id.* However, relinquishment of private land by private parties frequently occurs. *The Antiquities Act*, *supra* n. 10, at 32.

233. See 16 U.S.C. § 431 (emphasis added).

234. Briggett, *supra* n. 8, at 411–416.

the scope of the Act, protecting additional objects that might otherwise be endangered or destroyed.

The legislative history of the Antiquities Act provides few clues of the congressional intent for the phrase “lands owned or controlled.”²³⁵ It is known that Hewett inserted the language to ensure that lands beyond those that were unappropriated would be covered under the Act.²³⁶ Congress did, however, believe the Act’s scope extended to private land.²³⁷

The plain language supports a broad reading of the term.²³⁸ First, if Congress did not want the Antiquities Act to include private lands, the language, “or controlled by,” would not have been included. There is further evidence of the inclusion of private land in the second sentence of the Act, which anticipates the Act’s interaction with private interests.²³⁹ The second sentence of the Act specifically contemplates the location of a national monument or the management zone on tracts of land under private ownership or subject to a private claim.²⁴⁰ When these situations arise, the private party retains discretion to relinquish control to the government.²⁴¹ In

235. *Supra* pt. I.A.

236. *The Antiquities Act*, *supra* n. 10, at 41.

237. *Supra* pt. I.A.

238. Squillace, *supra* n. 7, at 486. Courts have deferred to the plain language of the Act to resolve other disputes. James R. Rasband, *Utah’s Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. Colo. L. Rev. 483, 501–502 (1999).

239. *See* 16 U.S.C. § 431 (“When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.”).

240. *Id.* The Act specifically notes a “bona fide unperfected claim.” *Id.* However, this analysis will focus on all claims due to the fact that if the claim were perfected, the claim would likely be subject to the Act under the term “private ownership.” *See Cameron*, 252 U.S. at 456 (discussing valid mineral claims on national monuments). Arguably, a “bona fide unperfected claim” is neither owned nor controlled by the United States. *Id.* Congress likely included the language beyond private ownership to ensure a “bona fide unperfected claim” would not escape the scope of Act. *Id.*

241. 16 U.S.C. § 431.

situations where private actors have discretion over control or ownership, there is less danger in reading the “controlled land” broadly. Private actors, however, may not always have such discretion.

The Supreme Court's decision in *Cappaert v. United States*²⁴² helps to demonstrate the possible extent of “controlled lands;” however, the Court did not specifically analyzing the language of the Act. Years after President Truman's Devils Hole Proclamation, the United States sought an injunction against Cappaert's groundwater pumping on their ranch.²⁴³ The United States argued that pumping lowered the water level in Devils Hole, endangering the only known habitat for Devils Hole pupfish.²⁴⁴ The Court affirmed the injunction, ruling “[w]hen the Federal Government reserves land from the public domain, by implication it reserves water rights sufficient to accomplish the purposes of the reservation and that here, the 1952 Proclamation expressed an intention to reserve unappropriated water.”²⁴⁵ Although the Court does not specifically examine the relevant language of the Antiquities Act to reach the conclusion, *Cappaert* demonstrates how a national monument may reach beyond the public domain,²⁴⁶ analogous to congressional authority under the Property Clause.²⁴⁷

The limits of “controlled lands” under the Antiquities Act remain undefined. The definition could certainly be stretched to reach beyond public lands, even without permission of owners. Future presidential proclamations should account for this ambiguity to ensure protection of precious land or objects.

242. *Cappaert*, 426 U.S. at 128.

243. *Id.* at 131–134.

244. *Id.* at 132–134.

245. *Id.* at 129.

246. Proclamations on federal land are constitutional under the Property Clause. *Supra* pt. II.A.2. Proclamations beyond federal land could be authorized under the Commerce Clause. *See U.S. v. Lopez*, 514 U.S. 549, 558–559 (1995) (“‘Congress’ commerce authority includes the power to regulate those activities . . . that substantially affect interstate commerce.”). National monuments substantially affect interstate commerce. *See Rusnak, supra* n. 13, at 711–712 (discussing the effect of increased tourism).

247. *See Block*, 660 F.2d at 1249 (“Under this authority to protect public land, Congress’ power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”).

C. Utilizing an Extended Scope

Because portions of the Antiquities Act remain largely unexplored by courts and scholars, this part describes two methods presidents can take to extend the scope of the Act: 1) the sliding-scale test and 2) the negotiate-proclaim method.

1. Sliding-Scale Test

To determine the scope of “controlled lands” under the Antiquities Act, a sliding-scale test could determine if land or objects are subject to the proclamation or reservation powers of the Act.²⁴⁸ This sliding-scale test first requires a determination of the size of the object, landmark, or structure. As the size of the object increases, the amount of federal control required for national monument status also increases. At the extreme, smaller objects, such as pottery, would require a small degree of federal control while a vast landscape with varying characteristics would require virtually complete federal control. In between these extremes, the standards of measurement would be less precise, potentially leading to controversial national monuments. Thus, without ownership or control under the sliding-scale test, a president could not make a proclamation or reservation under the Antiquities Act.

The main advantage of utilizing the sliding-scale test for controlled land is that it enlarges the scope of the Antiquities Act, protecting more historic and scientific objects at risk of being lost forever. This advantage is in line with the purpose of the Act.²⁴⁹ Additionally, it could be argued that the sliding-scale test contradicts the legislative history of the Act to a lesser degree than its contemporary usage. Foremost, Congress believed that the Antiquities Act could protect small, important objects on private

248. A sliding-scale test has been used to determine personal jurisdiction for websites. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). The test examines the interactivity of a website: as interactivity increases, the likelihood that the website will be subject to personal jurisdiction also increases. *Id.* at 1124.

249. *Supra* pt. I.A.

land.²⁵⁰ A sliding-scale test would allow this end without trampling on private property rights. Furthermore, the sliding-scale test would allow for small tracts or small relics to be protected without locking up large tracts of federal land. The reservations could also be temporary but only to the point of ensuring proper recovery.²⁵¹

Utilizing the sliding-scale test on portions of private lands raises other concerns. Because large tracts would require nearly complete federal control, Congress, as the ultimate authority on public land, could wield its power under the Property Clause to alleviate any concern about the legitimacy or size of a monument. Smaller proclamations and reservations on private land under federal control, however, may be able to evade the legislative check on the power. The Constitution provides different recourse — the Takings Clause. The Fifth Amendment states that the government cannot take “private property . . . for public use, without just compensation.”²⁵² As the term “public use” has been interpreted broadly, national monuments likely fall within the scope of eminent domain.²⁵³ Of course, declarations and reservations on private land, even with just compensation, would likely generate controversy.²⁵⁴

To minimize public controversy, the scales of the sliding test could differ between the declaration and reservation power. A lower threshold of control would be required for the declaration power, but a higher threshold of control would be required for the reservation power. Merely declaring a national monument on federally controlled land stirs up less controversy because the designation

250. Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 Am. U. L. Rev. 517, 537 n. 114 (1992) (citing H.R. Rpt. No. 2224, 59th Cong., 1st Sess. 1 (1906)).

251. Hewett recognized that some monuments would only need to be temporary. *The Antiquities Act*, *supra* n. 10, at 45.

252. U.S. Const. amend. V.

253. See *Kelo v. City of New London*, 545 U.S. 469, 478–480 (2005).

254. See Ilya Somin, *The Politics of Economic Development Takings*, 58 Case W. Res. L. Rev. 1185, 1190–1192 (2008) (detailing the “unprecedented political backlash” on eminent domain caused by *Kelo*). National monuments are not to be created for the purpose of economic development. See 16 U.S.C. § 431. Conversely, national monuments may be controversial for economic repression. See Rusnak, *supra* n. 13, at 706–707 (finding the Grand Staircase-Escalante National Monument cost Utah jobs and mining royalties).

comes with little negative impact.²⁵⁵ Although a declaration without a reservation places some limit on land use,²⁵⁶ utilization of the reservation power would be more restrictive of private land use. A reservation of controlled land under the Antiquities Act establishes additional land as a part of the national monument.²⁵⁷ The amount of land affected is quite significant because the management plans contained in national monument proclamations tend to govern the whole monument, not just the declared object or landmark.²⁵⁸ Of course, presidents need not protect the land reserved under the reservation power to the same degree as the object, structure, or landmark reserved under the declaration power.²⁵⁹

The sliding-scale test may provide opponents with the argument that the Antiquities Act allows governmental interference with private property.

2. *The Negotiate-Proclaim Strategy*

Another potential extension of Antiquities Act power is the negotiate-proclaim strategy.²⁶⁰ This strategy utilizes the separation

255. See Squillace, *supra* n. 7, at 582 (discussing public support for national monument designations).

256. Penalties for appropriating, excavating, injuring, or destroying national monuments apply even in a situation where the president has not utilized the reservation power. 16 U.S.C. § 433.

257. 16 U.S.C. § 431.

258. See e.g., Exec. Procl. 8335, 74 Fed. Reg. 1557 (establishing Marianas Trench Marine National Monument); Exec. Procl. 7984, 71 Fed. Reg. 10793 (establishing African Burial Ground National Monument); Exec. Procl. 6920, 61 Fed. Reg. 50223 (establishing Grand Staircase-Escalante National Monument).

259. Although the size of the reservation is limited by “the proper care and management of the objects to be protected,” the Act does not state the care must be equal at all points of the national monument. See 16 U.S.C. § 431. Land that may be required for “the proper care and management of the objects to be protected” may require different degrees of protection. *Id.* Therefore, a president may reserve land but provide less protection for some of the land depending on the proximity to the protected object. Adopting this strategy would limit interference with private land use.

260. The phrase is the creation of the author. It is inspired by the “no surprises” policy of Bruce Babbitt, President Clinton’s Interior Secretary, leading to perhaps the greatest use of the Act by a president. *The Antiquities Act, supra* n.

of the Act's two powers in tandem with the ambiguity of the term "controlled lands." The strategy encourages the president to use the broad power of the Act and the ambiguous term as a bargaining chip in the negotiation process with private parties. The ultimate goal of the strategy is to obtain access for monument management or to ensure the private owner will provide proper management of the monument.²⁶¹

The process would begin with a potential site. While a private owner could alert a president to a potential national monument, a president may also seek out national monuments. Then, the president would alert the private owner of his or her intent to declare a national monument.²⁶² Initially, the president's personal contact would discuss the importance of the object or site, laying the foundation for cordial negotiations. The president would then assign a negotiation team to meet with the private owner. For objects on land owned and completely controlled by a private party, the presidential negotiation team would have to persuade the owner to relinquish control, or a declaration could not be made. For objects on land with a degree of federal control, the negotiation team would state its case, holding the Antiquities Act as a trump card — the declaration and reservation could be made regardless of cooperation under the broad authority of the Antiquities Act. After successful negotiations, the president may proclaim the new national monument.

In either case, the negotiation team could utilize the land exchange program, exchanging private or state land for federal land. In prior settlements of Antiquities Act controversies with states, the

10, at 111–125. Of course, the strategy proposed in this article advocates the use of negotiation to extend the scope of the Act to private land.

261. The terms "negotiate" and "proclaim" are interchangeable. The president may either proclaim and then negotiate or negotiate and then proclaim. For the sake of conserving judicial resources and not overbearing private parties, the negotiate-proclaim strategy is preferred. *Cappaert*, 426 U.S. at 132–134 (disputing the 1952 proclamation from 1970–1976). Also, the president can only proclaim monuments on "lands owned or controlled," not wholly private lands. 16 U.S.C. § 431. Therefore, the proclaim-negotiate strategy cannot be utilized when the object is situated on land where the United States cannot claim control.

262. Advance notice does not hinder monument proclamations. *The Antiquities Act*, *supra* n. 10, at 143–44.

federal government has turned to the land exchange program.²⁶³ Another option would be to allow for private management of national monuments. The Antiquities Act does not require the government to provide proper care and management.²⁶⁴ Without a doubt, many private owners would take pride in “their” national monument.²⁶⁵ And those who would not care for the designation could refuse, participate in a land exchange, or demand other “just compensation.”

A significant advantage of adopting this strategy is the ability to minimize public controversy through negotiation. Controversy often leads to rallying cries by Antiquities Act opponents to amend or repeal the Act.²⁶⁶ Furthermore, the negotiate-proclaim strategy would not allow presidents to completely bypass engaging interested parties. Instead, at least a portion of the American public, a private party, would be involved. Therefore, the negotiate-proclaim strategy provides numerous advantages in addition to expanding the protection of American antiquities.

D. Future Revisions of the Antiquities Act

The Antiquities Act could further benefit from a definition section. A handful of questionable, undefined terms in the Act have been used to extend the scope of the Antiquities Act. A definition section could preserve the traditional scope of the Act while imposing limits that would appease opponents of the Act.

263. Rusnak, *supra* n. 13, at 700–701; Squillace, *supra* n. 7, at 511–512. After declaration of the Grand Staircase-Escalante Monument, Utah retained title to lands designated for use as school lands but now located within the boundaries of the national monument. Rusnak, *supra* n. 13, at 700–701. Utah successfully convinced Congress to allow the state to trade the land for other federal lands not located within the national monument. *Id.*

264. See 16 U.S.C. § 431. The Act provides that the private party *may* relinquish the tract to the government when the object is on private land.

265. Presidents must be careful not to water-down the “national monument” designation. See *Supra* pt. II.B.1.

266. The controversial use of the Act by President Franklin D. Roosevelt to declare Jackson Hole a national monument led to legislation prohibiting the Act’s use in Wyoming. *The Antiquities Act*, *supra* n. 10, at 81. Following President Carter’s designation of Alaskan national monuments, the Act was amended to limit the use of the Act in Alaska. *Id.* at 93.

To provide a greater limitation to the definitional objects above, Congress could attempt to formulate a limiting definition of “historic or scientific interest.” However, this seems a difficult task considering that any serious limitation could place fragile resources at risk. Instead of a specific definition, Congress could impose post-proclamation review by a respected historical or scientific body to ensure a consensus of “historic or scientific interest.” The proposed national monument could also be granted full protection pending the review process. This review mechanism would place a meaningful counterweight on the president’s vast authority.

As noted above, much of the controversy associated with the Act relates to proclamations or reservations of private land through broad use of the phrase “controlled land.” Congress could resolve the problem in a definition section. Taking a cue from the second sentence of the Act,²⁶⁷ controlled land could include: 1) land with severed surface and mineral rights which either claim unperfected by a private party or government title to either surface or mineral rights, or 2) the voluntary relinquishment of private property to the government by instrument, such as an easement or any other right less than complete ownership. Of course, Congress could make the definition broader, including a sliding-scale test, or narrower, such as a limitation to public land only. A clear definition of “controlled land” would significantly reduce the Antiquities Act’s ambiguity, but Congress must ensure the over-arching purpose of the Act remains undisturbed.

Throughout the Act’s history, from debate to recent proclamations, the size of the national monument has been a point of contention. Congress could further limit this controversy by defining the phrase “smallest area compatible.” Congress could utilize a variety of definitional approaches to limit the size of national monuments. For example, the definition of “smallest area

267. The second sentence of the Antiquities Act states: “When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.” 16 U.S.C. § 431. The Act clearly distinguishes perfected mineral claims from unperfected mineral claims and contemplates private relinquishment of land.

compatible” could be linked with the definitions of “landmarks,” “structures,” and “objects.” Alternatively, the Act could be amended to require approval of large national monuments above an acreage threshold, either by Congress or an independent review body, as suggested above for determinations regarding “historic or scientific interest.” Before taking action, however, Congress should consider the Antiquities Act contribution to preservation and conservation that has extended for over a century.²⁶⁸

IV. CONCLUSION

Although the Antiquities Act has a rich historical tradition of preservation and conservation, the outer limits of the Act remain unknown. Accordingly, presidents should continue to slowly push the boundaries of the Act in order to conserve America’s historic and scientific landmarks and surrounding landscapes. These conservation goals could be accomplished in several ways. First, by separating the Act’s declaration and reservation powers and reading the term “controlled” broadly, the president will have more latitude in making monument designations. Second, although the Act has been historically used to protect large tracts of public land, the Act may also be increasingly used to protect smaller objects and smaller tracts on private land, perhaps even allowing private or state management of national monuments. Finally, the president could expand the scope of the act by using the sliding-scale test or the negotiate-proclaim strategy. Because it provides for more public input, the negotiate-proclaim strategy is preferred. However, using the sliding-scale test in unison with the strategy could provide greater protection to these potential monuments. The Antiquities Act will continue to raise public controversy, but a proper and limited expansion of the

268. Depending on the political climate and size of the controversy, Congress could also look to previously failed bills for amendment guidance. There are many other potential reforms, including: limiting the size of monuments, requiring congressional approval, providing notice to state governments, requiring NEPA compliance, or combining of one or more of these limitations. *See* Rusnak, *supra* n. 13, at 723–728.

Act will provide vital protection for America's important historical objects, structures, and landmarks.

